

faith. Common and private carriers will have that incentive to avoid mandatory relocation. They likely would not have that incentive if relegated to secondary status because in that instance relocation will be inevitable, and a balanced solution will be less likely to occur.

New users also will have the incentive to negotiate with a co-primary user. Co-primary status will be more likely to give them expeditious and less expensive access to the spectrum than would mandatory relocation. It will be far cheaper for access to be obtained if new users can negotiate and avoid having to compensate existing users for substantial and possibly unnecessary relocation and equipment replacement costs.

Assuming negotiations fail, relocation should not be required until shown to be absolutely necessary. At a minimum, relocation should not occur until a legitimate basis has been shown to exist requiring another use of the spectrum. In addition, there should be a showing that a qualified and committed new user with quantifiable customer demand is present and ready to provide service. Otherwise, valuable and efficiently used spectrum could be unjustly expropriated for a highly speculative use or for pure monetary gain with no public benefit.

If relocation is required, SBC agrees that it should not occur (if at all) until after the expiration of a fixed period (at least 15 years). In the interim, existing

licensees should be allowed to operate on a co-primary basis in the affected band with new operators. The Commission should make it clear at the outset that the existing operator will be compensated by the new user for its full transition costs, including but not limited to, equipment replacement costs. However, the details of such compensation should be left to private negotiation, and the Commission should not interfere with that process, except to establish general guidelines and procedures to be followed if negotiations fail.<sup>40</sup>

#### 4. Tax Certificates.

The Commission seeks comment on whether it should award tax certificates to fixed microwave licensees as part of an agreement to surrender their license and use other non-radio, alternative media.<sup>41</sup> A tax certificate is a method through which the Commission can encourage the sale or exchange of property made necessary or appropriate by a change in or adoption of a new Commission policy. The incentive is provided by the certificate which treats the sale or exchange as an involuntary conversion of property and as eligible for non-recognition of gain or loss under the tax laws. See 26 U.S.C. § 1071 and 1033.

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<sup>40</sup>Any number of arrangements could be utilized such as cash compensation, utilization of leased facilities (fiber, T-carrier) and the like.

<sup>41</sup>NPRM, n.17. Separate Statement of Commissioner Andrew C. Barret.

While the statutory provision allowing the issuance of tax certificates references the Commission's policies on the ownership and control of "radio broadcasting stations,"<sup>42</sup> the Commission has interpreted the statute to give it authority to issue tax certificates to effectuate a change in other radio policies. Specifically, the Commission has interpreted the statute to give it authority to issue tax certificates in connection with the transfer of non-wireline cellular partnership interests in cellular markets 31 through 90.<sup>43</sup>

If the Commission's interpretation of the statute is correct, it would appear to have equal authority to issue tax certificates in this instance. The sale or exchange of the 2 GHz facilities at issue would clearly be necessary or appropriate as a result of a change in or the adoption of a new Commission policy relating to radio communications. In addition, the sale or exchange of assets in this instance for all practical purposes would be involuntary, since it is unlikely that the incumbent licensees would sell or exchange those assets but for the Commission's reallocation of radio spectrum and resulting relocation policy. Therefore, SBC believes that it would be appropriate in this instance for

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<sup>42</sup>26 U.S.C. § 1071.

<sup>43</sup>In re Petition of Telocator Network of America For Issuance of Tax Certificates For Exchanges of Non-Wireline Cellular Partnership Interests In Cellular Radio Service Markets 31-90, F.C.C. 85-508, Memorandum Opinion And Order, (released September 17, 1985).

the Commission to use an award of tax certificates to encourage existing licensees to cooperate in the implementation of its new policy and to do so without any adverse impact on their tax liabilities.

Nevertheless, SBC does not believe that the issuance of tax certificates should be limited to those situations where the incumbents relocate to alternative media. If tax certificates are issued, they also should be available to licensees who are converting their 2 GHz operations to other radio spectrum. The tax consequences on those licensees would be no less real, and they too would be the result of a change in Commission policy. Moreover, as stated previously, conversion to alternate media in many cases may not be as viable an option as converting to other spectrum. Consequently, tax certificates may not completely achieve the Commission's objectives if they are limited in availability to those who convert to other non-radio media. Tax certificates should be available for conversions to all types of media if undertaken as a result of the change in the Commission's policy.

#### IV. Use Of Emerging Technologies Bands.

The Commission seeks comment on the criteria to be applied in determining whether a new service or expansion of an existing service merits frequencies from the emerging technologies bands. The Commission indicates its general view that, at a minimum, requests for operation of new

services in these bands should demonstrate that the service makes innovative use of a new technology and that the technology is most appropriately suited to operate in the 2 GHz region. The Commission further indicates that requests for expansion of existing services should demonstrate that the expansion would offer some substantial improvement in either quality of service or spectrum efficiency.<sup>44</sup>

SBC concurs in the Commission's proposal that a new service applicant should be required to demonstrate innovation and operational compatibility with the 2 GHz spectrum. The Commission should require the showing to be sufficient to justify displacing or inconveniencing the existing use. In the alternative, the applicant should be required to show or to list the steps that it proposes to take so that no such displacement will occur. For example, the applicant should commit to the use of unused channels. The new service applicant also should factually demonstrate an actual and quantifiable demand or need for the amount of the requested spectrum, and should be required to show that it is qualified, committed, and ready to provide the service.

For reasons already stated, SBC does not agree that there should be unnecessary restrictions on the expansion of pre-existing services, particularly in areas where use of the existing spectrum may not be impacted by

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<sup>44</sup>NPRM, para. 28.

the offering of a new technology service for some time. Therefore, SBC opposes the proposed requirement that expansion of those services only be allowed when offering a substantial improvement in either quality of service or spectrum efficiency. Expansion of those services should be allowed, and the most which such applicants should be required to show is that the facilities are necessary to meet a proven or reasonably expectant telecommunications service need in such areas.

V. Significant Alternatives.

The Commission states that its proposal will provide spectrum for the development of new innovative technologies in the immediate future, and that it is unaware of other alternatives that would provide such flexibility.<sup>45</sup>

In fact, the Commission has numerous alternatives. It can wait until it has more data (including data on spectrum sharing) so that a reallocation decision is not premature. It can start with a more limited reallocation that excludes the common carrier band. It can wait until Congress decides on the treatment of the 1.71-1.85 1 GHz U.S. government band currently administered by the NTIA before making a large, reserve allocation for the use of new services. Or it can modify its reallocation and relocation plan in the particulars set forth herein.

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<sup>45</sup>NPRM, para. 30, G.

VI. Conclusion.

The record does not adequately support the Commission's proposed spectrum reallocation of 220 MHz for emerging technologies. Other alternatives should be considered, including gathering more data before making a potentially irreversible reallocation decision that would involve the massive and possibly unnecessary displacement or relocation of valuable current services and licensees.

In the alternative, the Commission should reconsider or revise its tentative decision which would require the relocation of 2 GHz providers of common carrier services. The Commission should either exempt the common carrier band from the proposed reallocation or it should allow common carriers to continue to operate indefinitely in the band on a co-primary basis. The Commission should also eliminate its cut-off date on the construction of new or expanded 2 GHz common carrier facilities.

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